IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2 OF 2006
IN
SUIT NO.3540 OF 2005

Sheth Builders Pvt. Ltd. ..Plaintiffs.

Vs.

Michael Gabriel & Ors. ..Defendants.

Mr.P.K.Samdhani, Senior Advocate i/b.M/s.Mahimtura & Co. for the Plaintiffs.

Mr.R.D'Souza with Mr.Jose George for Defendant No.1.

Mr.O.A.Das for Defendant No.3.

Mr.K.D.Sreejith i/b.Sreeji & Lal for Defendant No.5.

CORAM : S.J. VAZIFDAR, J.
CDATED : 4TH OCTOBER, 2006

P.C. :

The suit is filed for specific performance of an agreement dated 15.3.2005 entered into between the Plaintiff and Defendant Nos.1 to 4. By clause 2, Defendant Nos.1 to 4 entrusted the development of their property to the Plaintiffs. The consideration under clause 3 is Rs.50,00,000/-, to be paid in the manner stated therein. Clauses 5(e), 10, 11 and 19 of the agreement read as under :

"5. Simultaneously upon execution hereof the Owners have permitted and/or otherwise granted license to enter into said property to the Developers for the purpose of carrying out the said Development work on the said property.

a. .....

b. .....

c. .....

d. .....

e. To sell the flats/other premises in the building or structure to be constructed on the said property on such terms and conditions as may be thought fit by the Developers and for that purpose, enter into such agreements as the Developers may think fit, and receive the price, income ... profit therefrom and to appropriate the same to themselves.

10. The Owners agree and declare that by virtue of Agreement the Developers shall have full right and absolute authority to sale, mortgage and/or transfer the said property and/or create third party rights in respect thereof.

11. The First Owner states, confirms and declares that he has executed the present Agreement as constituted attorney, for and on behalf of the Owner Nos.2 to 4 under the Power of Attorney dated 28th January 1981 and that the said Power of Attorney dated 28th January 1981 by is valid, in force and not revoked or cancelled by the Vendor Nos.2 to 4 at any time in any manner and the said Michael Gabriel further states, confirms, represents and

> declares that he has not done any act, deed or matter concerning and relating to the said property, under or pursuant to the said Power of Attorney dated 28th January 1981 whereby the absolute ownership right, interest and title of the Owner Nos. 2 to 4 in the same are affected in any manner.
>
> 19. Simultaneously upon execution of this Agreement, the Owners shall execute an irrevocable Power of Attorney in favour of the Developers and/or their nominees, viz. granting them all the powers required for the smooth development of the said property. Under the Power of Attorney the Owners shall authorize the Developers to execute the Deed of Conveyance of the said property in favour of the Developers or nominee or nominees of the Developers, viz. Society / Condominium / Company."

2. The only contention raised on behalf of Defendant No.1 is that he did not have the authority to sign the agreement on behalf of Defendant Nos.2, 3 and 4. He does not dispute the fact that he signed the agreement.

3. The aforesaid clauses indicate that Defendant No.1 represented himself expressly as a constituted attorney on behalf of Defendant Nos.2, 3 and 4 as well. He has signed the agreement on their behalf. It does not lie in the mouth of Defendant No.1 to take this defence. Defendant Nos.2, 3 and 4

would be entitled to take this defence. Further, in paragraph 12 of the plaint, it is stated that Defendant No.1 executed the agreement for himself and on behalf of Defendant Nso.2 to 4. There is no affidavit in reply filed on behalf of Defendant Nos.2 to 4. The averment therefore remains uncontroverted.

4. The Plaintiff contends that a sum of Rs.17,00,000/- was paid to Defendant Nos.1 to 4. The same is evidenced by a receipt (Exhibit "D" to the plaint) signed by Defendant No.1 for himself and as the constituted attorney of Defendant Nos.2 to 4.

5. In this view of the matter, it is not possible to accept the contention that Defendant No.1 did not represent Defendant Nos.2 to 4 in the transaction. It is however contended that the power of attorney, on the basis whereof Defendant No.1 executed the agreement, does not contain a power to sell the property. However, the fact remains that Defendant No.1 expressly represented that he was entitled to execute the agreement even on their behalf. Defendant No.1 accepted the money atleast, purportedly on their behalf. Defendant Nos. 2 to 4 have not stated that Defendant No.1 did not act on

their behalf. The power of attorney is not the only basis on which the agency could have been created by Defendant Nos.2 to 4. The same could have been created even orally. The averment in paragraph 12 of the plaint has not been denied.

6. In proceedings before the Deputy Collector (Appeals) instituted by Crompton Greaves Ltd. and Defendant No.2, an order dated 30th May, 2005 was passed. In that order, the contention of the first Defendant is recorded in paragraph 3, to the following effect :-

> "The defendants have also submitted that they themselves have also sold the property to M/s.Sheth Builders Pvt. Ltd. by a deed dated 15-3-2005 and have also put them in possession therefore in my opinion the question of appellant company on one hand is assigning right which it does not possess at all to M/s.D.S. Construction Company and on the other hand is making appeal before this authority. Therefore, this appeal is not maintainable. (The property card to be transferred in the name of M/s.Sheth Builders Pvt. Ltd."

7. By a letter dated 23.5.2005 addressed to the Plaintiff, Defendant No.1 merely alleged that the Plaintiff had not fulfilled the terms and conditions

of the agreement and without specifying the same he merely stated that he was therefore not interested to continue the said M.O.U.

8. It is obvious that this was done simultaneously with Defendant Nos.1 to 4 having entered into an agreement with Defendant No.5. This is obvious from the fact that by a letter dated 26.5.2005 Defendant No.5 informed the Plaintiff that it has entered into a joint venture agreement dated 6.5.2003 with Defendant Nos.1 to 4. It is obvious that Defendant No.5 has the notice of the Plaintiff's agreement.

9. It is pertinent to note that even the agreement with Defendant No.5 had been signed only by Defendant No.1. The learned counsel appearing on behalf of Defendant No.5 merely submitted that his agreement was on the same footing as the agreement of the Plaintiff. No further submissions were made.

10. The matter was heard yesterday and was kept today only to seek a clarification from Mr.Samdhani on behalf of the Plaintiff, regarding Mr.D'Souza's submission that he had no power to execute the agreement.

11. Today, Mr.Das, appearing on behalf of Defendant No.3 submitted that Defendant No.4 has been suffering from depression from the last 2 to 3 years and therefore it is necessary to appoint a next friend to represent her. At present there is no such application before me. It is only possible to consider such an application at the stage when the same is made.

12. Mr.Das submitted that Defendant No.3 has not been served with the present Notice of Motion. An affidavit of service has been filed by the Plaintiff in which it is stated that when the proceedings were sought to be served upon Defendant Nos.1 to 4, one Samin called Defendant No.1 on his cell phone and sought instructions. He was instructed by Defendant No.1 to accept service on behalf of Defendant Nos.1 to 4. Defendant No.1 has not denied the same.

13. It is obvious that the appearance on behalf of Defendant No.3 today is an after thought. Defendant No.3 admits that she appeared today as she was informed about this hearing by Defendant No.1 yesterday. It is contended that Defendant No.4 had earlier terminated the power of attorney. The power of attorney, in any event, authorises Defendant No.1

to declare and affirm all plaints, written statements, applications, affidavits etc. and to appear before any Judge or any officer relating to any of the matters relating to them and/or in which any of them may be interested. Obviously, therefore, one of the powers granted was to accept service of legal proceedings.

14. The contention that Clause 1 of the power of attorney limits and restricts the remaining clauses is unfounded. Clause 1 of the power of attorney authorises Defendant No.1 to demand, receive and recover monthly rents, lease monies etc. in respect of the immoveable properties. The subsequent clauses are not limited to immoveable properties. The subsequent clauses authorised the power of attorney holder to do and perform various other acts, deeds and things as well. In the circumstances, it must be held that Defendant No.3 was validly served in the proceedings.

15. The doubt, if any, is removed by the fact that on 10.1.2006 Mr.D'Souza, instructed by another Advocate, appeared on behalf of Defendant Nos.1 to 4 and not merely on behalf of Defendant No.1.

16. It is obvious that this fact also establishes that the appearance of Defendant No.1 and the contention raised today, is nothing but an after thought.

17. In the circumstances, the Notice of Motion is made absolute in terms of prayers a(i) and a(ii).

18. Defendant Nos.1 and 3 shall each pay the costs of this Notice of Motion to the Plaintiff, fixed at Rs.5000/- within eight weeks from today.